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Counsel for Plaintiffs

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF
MONTANA - BUTTE DIVISION

COTTONWOOD)
ENVIRONMENTAL LAW CENTER;)
MONTANA RIVERS; and GALLATIN) Case No. 2:20-cv-00028-BMM
WILDLIFE ASSOCIATION,)
)
)
Plaintiffs,) AMENDED COMPLAINT FOR
vs.) DECLARATORY AND
) INJUNCTIVE RELIEF
RON EDWARDS, in his official)
capacity as Manager of the Big Sky Water)
and Sewer District; and BIG SKY)
WATER AND SEWER DISTRICT,)
)
Defendants.)
)
)

INTRODUCTION

1. This lawsuit seeks to stop Defendants from continuing to discharge pollutants into the West Fork of the Gallatin River without a Clean Water Act permit.
2. The Clean Water Act prevents a person or corporation from discharging pollutants from a point source into waters of the United States without a permit.
3. The Water Resources Recovery Facility is a wastewater treatment plant for the community of Big Sky, Montana.
4. The Water Resources Recovery Facility is located directly adjacent to the West Fork of the Gallatin River.
5. The Water Resources Recovery Facility discharges nitrogen and other pollutants from a discrete conveyance into the West Fork of the Gallatin River.
6. Nitrogen as Nitrate + Nitrite is a pollutant that is regulated under the Clean Water Act.
7. The West Fork of the Gallatin River is a water of the United States under the Clean Water Act.
8. The West Fork and Gallatin River provides important habitat to fish and wildlife and is a heavily used area for recreation.
9. Defendants have violated Section 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a), by causing nitrogen and other pollutants to be discharged from a point source into the West Fork of the Gallatin River without a National Pollutant Discharge Elimination System (“NPDES”) permit.

10. Excess nitrogen causes algae blooms in rivers and streams.
11. Algae blooms harm aquatic ecosystems.
12. The West Fork, and the Gallatin River below the West Fork, experienced significant algae blooms during the summer of 2020.
13. Defendants' continuous violations of the Clean Water Act harm Plaintiffs' aesthetic, recreational, conservation, and scientific interests in the Gallatin River and its tributaries, including the West Fork.
14. Plaintiffs sent Defendants a 60 Day Notice of Intent to Sue that alerted them they were in violation of the Clean Water Act.
15. Plaintiffs filed this lawsuit more than sixty days after the Defendants received the notice.
16. Plaintiffs collected water samples before and after sending the 60 Day Notice of Intent to Sue.
17. The lab results indicate the Defendants discharged Nitrate + Nitrite as N at nearly ten times the amount contained within the surface water at the point of discharge.



BRIDGER ANALYTICAL LAB

7539 Pioneer Way Suite B, Bozeman, MT 59718 Phone: (406) 582-0822
US EPA ID# MT00953 MT Certification Number CERT0094

Cottonwood Environmental Law Center
P.O. Box 412
Bozeman, MT 59771

Reported:
05/18/2020 10:46

Project Name: West Fork Gallatin

Client Sample ID: Stream 1 - Above water facility
Lab Sample ID: 2005046-01

Collection Date: 05/04/2020 10:48
Collected By: Jack Landers

Date Received: 05/04/2020

| Analyte | Result | Units | RL | Qual | MCL | Method | Analysis Date/By |
|---------|--------|-------|----|------|-----|--------|------------------|
|---------|--------|-------|----|------|-----|--------|------------------|

Inorganic

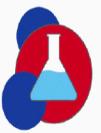
| | | | | | | |
|------------------------|-------|-------|-------|-----|---------------|--------------------|
| Calcium | 21.5 | mg/L | 0.50 | | ASTM D6919-09 | 05/08/20 14:08/JSS |
| Chloride | 13.2 | mg/L | 0.15 | | EPA 300.1 | 05/06/20 20:31/JSS |
| Conductivity | 165 | uS/cm | 0.10 | | SM 2510 B | 05/05/20 11:20/DSL |
| Fluoride | 0.138 | mg/L | 0.02 | 4 | EPA 300.1 | 05/06/20 20:31/JSS |
| Hardness | 106 | mg/L | 20.00 | H-1 | HACH 8213 | 05/05/20 13:10/DSL |
| Iron, Total | 0.20 | mg/L | 0.02 | | HACH 8008 | 05/05/20 16:50/DSL |
| Lithium | ND | mg/L | 0.07 | | ASTM D6919-09 | 05/08/20 14:08/JSS |
| Magnesium | 4.98 | mg/L | 0.20 | | ASTM D6919-09 | 05/08/20 14:08/JSS |
| Nitrate + Nitrite as N | 0.261 | mg/L | 0.05 | 10 | EPA 300.1 | 05/06/20 20:31/JSS |
| pH | 8.07 | S.U. | 0.10 | | SM 4500-H+B | 05/05/20 11:20/DSL |
| Potassium | 1.05 | mg/L | 0.50 | | ASTM D6919-09 | 05/08/20 14:08/JSS |
| Sodium | 10.3 | mg/L | 0.20 | | ASTM D6919-09 | 05/08/20 14:08/JSS |
| Sulfate | 7.83 | mg/L | 0.10 | | EPA 300.1 | 05/06/20 20:31/JSS |

Microbiological

| | | | | | | |
|----------------------|-------|------------|------|--|-------------------|--------------------|
| E.coli Count | 2.0 | MPN/100 mL | 1.00 | | Colilert Q-T/2000 | 05/05/20 15:00/DSL |
| Total Coliform Count | 129.6 | MPN/100 mL | 1.00 | | Colilert Q-T/2000 | 05/05/20 15:00/JSS |

Service

| | | | | | | |
|----------------|------|--|------|--|---------|--------------------|
| Filtration fee | 1.00 | | 0.22 | | 0.22 um | 05/06/20 10:26/JSS |
|----------------|------|--|------|--|---------|--------------------|



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Cottonwood Environmental Law Center
P.O. Box 412
Bozeman, MT 59771

Reported:
05/18/2020 10:46

Project Name: West Fork Gallatin

Client Sample ID: Stream 3 - west fork retaining wall
Lab Sample ID: 2005046-03

Collection Date: 05/04/2020 11:05
Collected By: Jack Landers

Date Received: 05/04/2020

| Analyte | Result | Units | RL | Qual | MCL | Method | Analysis Date/By |
|------------------------|--------|------------|-------|------|---------------|--------------------|--------------------|
| Inorganic | | | | | | | |
| Calcium | 74.3 | mg/L | 0.50 | | ASTM D6919-09 | 05/08/20 15:57/JSS | |
| Chloride | 28.7 | mg/L | 1.50 | | 250 | EPA 300.1 | 05/07/20 19:18/JSS |
| Conductivity | 554 | uS/cm | 0.10 | | | SM 2510 B | 05/05/20 11:20/DSL |
| Fluoride | 0.167 | mg/L | 0.02 | | 4 | EPA 300.1 | 05/06/20 21:44/JSS |
| Hardness | 310 | mg/L | 20.00 | H-3 | | HACH 8213 | 05/05/20 13:10/DSL |
| Iron, Total | 0.03 | mg/L | 0.02 | | | HACH 8008 | 05/05/20 16:50/DSL |
| Lithium | ND | mg/L | 0.07 | | | ASTM D6919-09 | 05/08/20 15:57/JSS |
| Magnesium | 17.3 | mg/L | 0.20 | | | ASTM D6919-09 | 05/08/20 15:57/JSS |
| Nitrate + Nitrite as N | 2.22 | mg/L | 0.05 | | 10 | EPA 300.1 | 05/06/20 21:44/JSS |
| pH | 7.65 | S.U. | 0.10 | | | SM 4500-H+B | 05/05/20 11:20/DSL |
| Potassium | 1.84 | mg/L | 0.50 | | | ASTM D6919-09 | 05/08/20 15:57/JSS |
| Sodium | 19.1 | mg/L | 0.20 | | | ASTM D6919-09 | 05/08/20 15:57/JSS |
| Sulfate | 13.6 | mg/L | 0.10 | | 250 | EPA 300.1 | 05/06/20 21:44/JSS |
| Microbiological | | | | | | | |
| E.coli Count | ND | MPN/100 mL | 1.00 | | | Colilert Q-T/2000 | 05/05/20 15:00/DSL |
| Total Coliform Count | 39.3 | MPN/100 mL | 1.00 | | | Colilert Q-T/2000 | 05/05/20 15:00/JSS |
| Service | | | | | | | |
| Filtration fee | 1.00 | | 0.22 | | | 0.22 um | 05/06/20 10:26/JSS |

18. Section 303(d) of the Federal Clean Water Act, and Title 40 part 130 of the Code of Federal Regulations requires each state to develop a list of waters that do not meet water quality standards (i.e., which do not fully support their beneficial uses).

19. The MT Department of Environmental Quality placed the West Fork of the Gallatin River on the 303(d) list because of Nitrate + Nitrite as N.



Appendix A: Impaired Waters

HUC: 10020008 Gallatin

Watershed: Missouri Headwaters

| TMDL Planning Area | ID305B | Waterbody Name/Location | Category | Size | Units | Use Class | B | AqL | Ag | DW | Rec | Cause Name * | Source Name * |
|--------------------|--------------|---|----------|-------|-------|-----------|---|-----|----|----|-----|---|--|
| Lower Gallatin | MT41H003_100 | DRY CREEK, headwaters to mouth (East Gallatin River) | 4A | 20.09 | MILES | B-1 | N | X | X | N | | Phosphorus, Total | Source Unknown |
| | | | | | | | | | | | | Physical substrate habitat alterations | Unspecified Unpaved Road or Trail |
| | | | | | | | | | | | | Sedimentation/ILTation | |
| Lower Gallatin | MT41H003_110 | BRIDGER CREEK, headwaters to mouth (East Gallatin River) | 4A | 21.46 | MILES | B-1 | N | X | X | N | | Chlorophyll-a | Grazing in Riparian or Shoreline Zones |
| | | | | | | | | | | | | Nitrate/Nitrite (Nitrite + Nitrate as N) | Impacts from Resort Areas |
| | | | | | | | | | | | | | Unspecified Unpaved Road or Trail |
| Lower Gallatin | MT41H003_120 | STONE CREEK, headwaters to mouth (Bridger Creek) | 4A | 6.06 | MILES | B-1 | N | X | X | X | | Alteration in stream-side or littoral vegetative covers | Grazing in Riparian or Shoreline Zones |
| | | | | | | | | | | | | Sedimentation/ILTation | Residential Districts |
| | | | | | | | | | | | | | Silviculture Harvesting |
| | | | | | | | | | | | | | Unspecified Unpaved Road or Trail |
| Lower Gallatin | MT41H003_132 | HYALITE CREEK, Bozeman water supply intake to the mouth (East Gallatin River) | 4A | 20.99 | MILES | B-1 | N | X | X | N | | Flow Regime Modification | Crop Production (Irrigated) |
| | | | | | | | | | | | | Nitrogen, Total | Leaking Underground Storage Tanks |
| | | | | | | | | | | | | | Managed Pasture Grazing |
| | | | | | | | | | | | | | Natural Sources |
| Upper Gallatin | MT41H005_010 | STORM CASTLE CREEK, headwaters to the mouth (Gallatin River), T4S R4E S33 | 5 | 14.19 | MILES | B-1 | N | F | X | F | | Alteration in stream-side or littoral vegetative covers | Forest Roads (Road Construction and Use) |
| | | | | | | | | | | | | Phosphorus, Total | Natural Sources |
| | | | | | | | | | | | | | Silviculture Activities |
| Upper Gallatin | MT41H005_020 | TAYLOR FORK, Lee Metcalf Wilderness boundary to mouth (Gallatin River) | 5 | 13.98 | MILES | B-1 | N | X | X | F | | Physical substrate habitat alterations | Silviculture Activities |
| | | | | | | | | | | | | Sedimentation/ILTation | Site Clearance (Land Development or Redevelopment) |
| Upper Gallatin | MT41H005_030 | CACHE CREEK, headwaters to mouth (Taylor Fork) | 5 | 4.66 | MILES | B-1 | N | F | X | F | | Alteration in stream-side or littoral vegetative covers | Agriculture |
| | | | | | | | | | | | | Physical substrate habitat alterations | Forest Roads (Road Construction and Use) |
| | | | | | | | | | | | | Sedimentation/ILTation | Silviculture Activities |
| Upper Gallatin | MT41H005_040 | WEST FORK GALLATIN RIVER, confluence Middle and North Forks to mouth (Gallatin River) | 5 | 3.87 | MILES | B-1 | N | F | F | N | | Chlorophyll-a | On-site Treatment Systems (Septic Systems and Similar Decentralized Systems) |
| | | | | | | | | | | | | Nitrate/Nitrite (Nitrite + Nitrate as N) | Silviculture Activities |
| | | | | | | | | | | | | | Nitrogen, Total |
| | | | | | | | | | | | | | Phosphorus, Total |
| | | | | | | | | | | | | | Site Clearance (Land Development or Redevelopment) |

AqL=Aquatic Life; Ag=Agriculture; DW=Drinking Water; Rec=Primary Contact Recreation

F=Fully Supporting; T=Threatened; N=Not Fully Supporting; I=Insufficient Information; X=Not Assessed; - = Beneficial Use Not Assigned

* The impairment cause and source names in this appendix are listed alphabetically. There is no implied relationship between the listed causes and sources. See individual assessment reports for details.

20. Defendants are discharging Nitrate + Nitrite as N into the West Fork of the Gallatin River, which is on the 303(d) list of water quality impaired streams because of Nitrate + Nitrite as N.

21. The unlawful discharge harms plaintiffs' members' aesthetic, recreational, conservation, and scientific interests in the water quality, aquatic species, and the health of the Gallatin River watershed, including the West Fork of the Gallatin River.

22. Plaintiffs seek declaratory and injunctive relief prohibiting Defendant from discharging nitrogen and other pollutants without obtaining and complying with an NPDES permit, an award of litigation costs, attorney fees, and expert witness fees.

JURISDICTION AND VENUE

23. This court has subject matter jurisdiction over the claims for violations of the CWA set forth in this Complaint pursuant to the CWA, 33 U.S.C. § 1365(a)(2). This cause of action arises under 33 U.S.C § 1365 (f)(1) as a violation of 33 U.S.C. § 1311(a).

24. Defendant is in violation of the CWA by discharging pollutants without a NPDES permit. The requested relief is proper under the CWA, 33 U.S.C 1365(a).

25. Venue in the United States District Court for the District of Montana is proper under 33 U.S.C. § 1365 (c) because defendant WRRF is located at 561 Little Coyote Road, Big Sky, Montana, 59716, and is thus within this district.

26. As required by the CWA, 33 U.S.C. § 1365(b)(1)(A), Plaintiffs provided

Defendants with notice of its intent to sue more than sixty (60) days before filing this Complaint. Plaintiffs also notified the Administrator of the United States Environmental Protection Agency (EPA), and the Montana DEQ (MTDEQ) of its intent to sue. Each recipient received notice on April 27th, 2020. Neither EPA nor DEQ have commenced any enforcement action to correct Defendant's CWA violation.

PARTIES

27. Plaintiff COTTONWOOD ENVIRONMENTAL LAW CENTER is a conservation organization dedicated to protecting the people, forests, water, and wildlife in the American West. Cottonwood members use the Gallatin River watershed for fishing, swimming, rafting, photography, guiding, and consumption.

28. Plaintiff MONTANA RIVERS works to increase public awareness about preserving water quality. Montana Rivers' members use the Gallatin River watershed for fishing.

29. Plaintiff GALLATIN WILDLIFE ASSOCIATION is an all volunteer conservation organization whose mission is to protect habitat and conserve fish and wildlife populations for our children and future generations. Gallatin Wildlife Association members use the Gallatin River watershed for fishing, swimming, rafting, photography, guiding, and consumption.

30. Plaintiffs use and enjoy the West Fork of the Gallatin River on a continuing

and ongoing basis. Defendants' discharge of pollutants harms the Plaintiffs' aesthetic, recreational, conservation, and scientific interests. Members of the Plaintiff groups have refrained from recreational activities on the West Fork and Gallatin River after learning about Defendants' discharges.

31. Plaintiffs have devoted time, energy, and money to protecting water quality and fisheries, and monitoring the West Fork of the Gallatin River. Plaintiffs' members and supporters have suffered and continue to suffer injury-in-fact on account of Defendants' CWA violations. The injury-in-fact is traceable to Defendant's conduct and would be redressed by the relief Plaintiffs seek.

32. Defendant BIG SKY WATER AND SEWER DISTRICT is a special purpose unit of government organized to regulate and operate the water and sewer systems in Big Sky, Montana.

33. Defendant RON EDWARDS is the General Manager of Big Sky Water and Sewer District. As Manager, Mr. Edwards is in the highest position at the facility, where he has the authority and responsibility to oversee the Water Resource Recovery Facility's compliance with laws and regulations, including the Clean Water Act ("CWA"). Defendant Edwards is sued in his official capacity.

LEGAL BACKGROUND

34. "Congress enacted the CWA in 1948 with the goal of *eliminating* the discharge of pollutants in order to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." *N. Cheyenne Tribe v. Mont. Dept. of Envtl.*

Quality, 2010 MT 302, ¶ 21, 356 Mont. 296, 302, 234 P.3d 51, 55 (2010) (emphasis in original) (citing 33 U.S.C. §1251(a)). “Congress developed the NPDES [National Pollution Discharge Elimination System] permit system to achieve this goal.” *Id*, (citing 33 U.S.C. §§1342 and 1311).

35. The CWA requires a NPDES permit for each and every point source discharge into a navigable waterway. 33 U.S.C. § 1342. “[T]he discharge of any pollutant by any person shall be unlawful” unless the discharge is made pursuant to and is authorized by a NPDES permit. 33 U.S.C. §§ 1311(a) and 1342(a). “The primary means for enforcing [water quality] limitations and standards is the NPDES [program].” *Arkansas v. Oklahoma*, 503 U.S. 91, 101-02 (1992).

36. The CWA defines “discharge of a pollutant” as “any addition of any pollutant to navigable waters from any point source.” 33 U.S.C. § 1362(12).

37. The CWA defines “point source” as a “discernable, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well ... from which pollutants are or may be discharged.” 33 U.S.C. § 1362(14).

38. The CWA broadly defines a “pollutant” as “dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water.” 33 U.S.C. § 1362(6).

39. The CWA defines “person” as “an individual, corporation, partnership,

association, State, municipality, commission, or political subdivision of a State, or any interstate body.” 33 U.S.C. § 1362(5).

40. The Environmental Protection Agency (“EPA”) administers NPDES permits unless a state has enacted its own enforcement program, in which case EPA’s Administrator (“Administrator”) must have approved the state’s program. 33 U.S.C. § 1342(a). Montana has elected to administer its own permit program – the MPDES program – which is under the control of the DEQ. Mont. Code Ann. §§ 75-5-402, 75-5-211; A.R.M. 17.30.101, 17.30.1201. Once delegated to a state, the state “stands in the shoes” of EPA, and states are obligated to implement all of the CWA’s requirements for the NPDES program. *N. Cheyenne*, ¶ 37.

41. The citizen suit provision of the CWA authorizes “any citizen” to “commence a civil action on his own behalf” in federal district court against any person who is alleged to be in violation of “an effluent standard or limitation” of the Act. 33 U.S.C. § 1365(a).

CLAIM FOR RELIEF

42. Plaintiffs reallege and incorporate by reference all preceding paragraphs.

43. Defendants have violated and continue to violate section 301 of the Clean Water Act, 33 U.S.C. § 1311(a), by discharging pollutants, including Nitrite + Nitrate as N, chloride, calcium, fluoride, iron, magnesium, potassium, sodium and sulfate, coliform, and other pollutants into the West Fork of the Gallatin River without an NPDES permit.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court grant the following relief:

- A. Declare, hold, and adjudge that Defendants have violated and continue to violate Section 301 of the Clean Water Act by discharging pollutants to navigable waters without an NPDES permit.
- B. Enjoin Defendants from further discharging pollutants to the West Fork and any other water of the United States except as expressly authorized by the CWA and the limitations and conditions of an applicable NPDES Permit.
- C. Order interim pollution monitoring and mitigation measures until Defendants comply with the CWA.
- D. Order Defendants to take actions to remediate environmental harm caused by its unlawful discharges.
- E. Award Plaintiff its reasonable litigation costs and expenses, including attorney and expert fees, incurred in bringing this action.
- F. Award such other relief as the Court may deem just and proper.

DATED this 23rd day of September, 2020.

Respectfully Submitted,

/s/ John Meyer
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Cottonwood Environmental Law Center

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Counsel for Plaintiff